UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AM PROPERTY HOLDING CORP., MAIDEN 80/90 NY LLC, AND MEDIA TECHNOLOGY CENTERS LLC, a single employer, a joint employer with PLANNED BUILDING SERVICES, INC.	:	
and	:	Case Nos. 2-CA-33146
	:	2-CA-33308
LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION	:	2-CA-33558
and	:	
UNITED WORKERS OF AMERICA (Party in Interest)	:	
AM PROPERTY HOLDING CORP., MAIDEN 80/90 NY LLC, AND MEDIA TECHNOLOGY CENTERS LLC, a single employer, a joint employer with SERVCO INDUSTRIES, INC.	:	
And	:	Case Nos. 2-CA-33864
	:	2-CA-34018
LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION	:	

RESPONDENT PLANNED BUILDING SERVICES, INC.'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECEMBER 15, 2017 DECISION AND ORDER

Despite nearly two decades of litigation, the issue of whether Respondent Planned Building Services, Inc. ("PBS") was an "individual successor" to Clean-Right, an in-house cleaning contractor of the Witkoff Group ("Clean-Right"), has never been litigated in any shape, fashion or form. As such, the factual record on the issue is nonexistent since, from the outset, the General Counsel's theory of the case focused exclusively on whether PBS and AM Property

Holding Corp. ("AM")—the entity with which PBS contracted to provide cleaning services at the Manhattan office building located at 80-90 Maiden Lane—were joint employers.

Nonetheless, in the Decision and Order issued by the National Labor Relations Board (the "Board") on December 15, 2017 (reported at 365 NLRB No. 162, and hereinafter as the "2017 Decision and Order"), the Board's majority, over the dissent of former Board Chairman Phillip A. Miscimarra, held in a 2-1 decision that (i) the previously unalleged and unlitigated "individual successor" issue was fully and fairly litigated (while admitting that no factual record on the individual successor issue exists); (ii) the actually alleged and litigated issue of whether PBS and AM were joint employers is somehow "closely connected" to the wholly distinct issue of whether PBS was Clean-Right's individual successor; and (iii) remand is unnecessary to cure the due process defects identified by PBS, despite the existing factual record remaining conspicuously incomplete regarding individual successorship and numerous ancillary issues directly related to PBS's purported successorship.[1]

Because the Board's 2017 Decision and Order violates PBS's due process rights, PBS respectfully moves the Board, pursuant to 29 C.F.R. § 102.48(d)(1), for reconsideration. In sum, PBS's Motion for Reconsideration (the "Motion") requests that the Board modify its 2017 Decision and Order and timely remand to the Administrative Law Judge ("ALJ") so that, consistent with due process, PBS and the Service Employees International Union, Local 32BJ (the "Union") can fully and fairly litigate the unalleged and previously unlitigated issue of whether PBS is an individual successor to Clean-Right. Remand would likewise comport with due process by permitting the parties to litigate a number of issues closely related to

[1] *See* 2017 Decision and Order, at *3 (holding that "(1) consistent with due process, we may determine (on the present record, without a remand) whether PBS individually was a successor employer; and (2) under established legal principles, PBS was indeed a successor with a duty to bargain with the Union").

successorship—*i.e.*, the appropriate bargaining unit at 80-90 Maiden Lane; the propriety of a multi-location unit; the continuity (if any) of PBS's and Clean-Right's operations; and whether PBS had the right to set initial terms of employment and/or had a duty to bargain with the Union.

PRELIMINARY MATTERS

I. PBS's Motion for Reconsideration is Timely.

"A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration . . . after the Board decision or order," provided that such motion is "filed within 28 days . . . after the service of the Board's decision or order." 29 C.F.R § 102.48(c)(2). When the Board issues a final order—such as its 2017 Decision and Order—the Board must serve the final order "upon all parties" and can effect proper service by various methods, including "registered or certified mail." 29 C.F.R. § 102.4(a).

The Board served its 2017 Decision and Order on PBS via mail, postmarked as of December 20, 2017. "Where service is made by mail . . . the date of service is the day when the document served is deposited in the United States mail . . . ." 29 C.F.R. § 102.3. Therefore, the Board's order was "served" for purposes of calculating the 28-day filing period on December 20, 2017, and PBS timely filed its Motion on or before January 17, 2018.

II. The Board Has Jurisdiction to Consider PBS's Motion.

"Until the record in a case shall have been filed in a court, . . . the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." 29 U.S.C. § 160(d); *NLRB v. Con-Pac, Inc.*, 509 F.2d 270, 272 (5th Cir. 1975) ("The Board [] has discretion to modify or set aside an order at any time before filing the record of the case in the Court of Appeals . . . ."). No "record" has been filed in any federal court, and, as such, the Board may still correct the material errors in

its 2017 Decision and Order. *See* 29 C.F.R. § 102.49 ("[U]ntil a transcript of the record in a case shall have been filed in a court . . . the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it.").

III. Due Process Necessitates the Granting of PBS's Motion.

A motion for reconsideration should be granted when "extraordinary circumstances" are present. *See* 29 C.F.R. § 102.48(d)(1); *Hercules, Inc. v. N.L.R.B.*, 833 F.2d 426, 430 (2d Cir. 1987) ("Only 'extraordinary circumstances' normally justify reconsideration . . . ."). "Extraordinary circumstances" arise when, as occurred in the present case, the Board's decision deprives a litigant of due process. *See Indep. Elec. Contractors of Houston, Inc. v. N.L.R.B.*, 720 F.3d 543, 551 (5th Cir. 2013) ("[I]t is appropriate to examine the due process issue based on the 'extraordinary circumstances' before us.").[2]

STATEMENT OF MATERIAL ERRORS

When filing a motion for reconsideration, the moving party "shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on." 29 C.F.R. § 102.48(c)(1). In the present case, the Board's majority committed at least four (4) material errors in its 2017 Decision and Order:

- ***First***, the Board disregarded the directives of the United States Court of Appeals for the Second Circuit (the "Second Circuit") to examine the existing factual record on remand and violated PBS's due process rights by failing to initially analyze whether the "individual successor" issue was fully and fairly litigated. Due process precludes the Board from reaching

[2] *See also* Brief of the National Labor Relations Board, *Altelier Condominium v. N.L.R.B.*, Case Nos. 14-4692 & 15-95, at p. 49 (2d Cir. Oct. 15, 2015) ("Any alleged material error in the Board's decision, including a purported due-process violation, can be brought to the Board's attention via a motion for reconsideration.").

the issue of whether PBS was an individual successor to Clean-Right because the issue was never fully litigated; yet the Board's majority, despite a dearth of record evidence, concluded to the contrary.[3]

- ***Second***, even if the unalleged and unlitigated "individual successor" issue was somehow fully and fairly litigated before the ALJ (as the Board's majority incorrectly held), the Board improperly conflated the actually litigated "joint employer" issue with the unalleged and unlitigated "individual successor" issue. To satisfy due process, there must be a "close connection" between the issue that was actually litigated—*i.e.*, whether PBS and AM were joint employers—and the unlitigated issue—*i.e.*, whether PBS was an individual successor of Clean Right. The connectivity required to satisfy due process is lacking in this instance, particularly as AM and Clean Right are wholly separate entities, and "joint employer" and "successorship" are two distinct factual and legal issues.[4]

- ***Third***, because due process is lacking for PBS, the Board erred in failing to remand the matter to the ALJ to permit the parties to litigate the individual successor issue. Remand to the ALJ is consistent with Board law, will cure the due process violations identified by PBS, and will allow the parties the opportunity to litigate a host of unresolved issues related to successorship, including (i) whether the bargaining unit at 80-90 Maiden Lane remained appropriate; (ii) whether a multi-location unit is appropriate; (iii) whether substantial continuity of operations existed between PBS and Clean-Right; (iv) whether, if PBS was an individual successor, PBS had the right to set initial terms of employment that differed from Clean-Right's;

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3 *See* 2017 Decision and Order, at *3-*5.

4 *See* 2017 Decision and Order, at *3-*4.

and (v) whether, if PBS was an individual successor, PBS was obligated to bargain with the Union.[5]

- ***Fourth***, the Board inexcusably delayed its issuance of the 2017 Decision and Order, with nearly six years passing since it first accepted remand from the Second Circuit. The Board's failure to act within a reasonable period of time vitiated the Administrative Procedures Act and materially prejudiced PBS. However, such prejudice may be able to be remedied by the Board correcting its 2017 Decision and Order and timely remanding this matter to the ALJ before additional witnesses and evidence are lost due to the passage of time.[6]

I. Due Process Precludes the Board From Reaching the Issue of Whether PBS Was an Individual Successor to Clean-Right Because the Issue Was Never Fully Litigated.

The Second Circuit's directives to the Board on remand were clear: The Board initially erred because it "should have determined, ***based on the facts in the record***, whether the issue of PBS's status as an individual successor to Clean-Right had been fully litigated . . . ." *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 448-49 (2d. Cir. 2011) (emphasis added); 2017 Decision and Order, at *11 ("The Court directed the Board to determine whether this unalleged 'individual successor' issue may be decided ***on the existing record*** consistent with due process . . . .") (Miscimarra, dissenting) (emphasis added). **Only** if the Board determined that the existing factual record supported a finding that the "individual successor" issue was fully litigated could the Board address whether the "individual successor" issue "was sufficiently related to the underlying complaint . . . ." *Service Employees Int'l Union*, *Local 32BJ*, 647 F.3d at 448-49; 2017 Decision and Order, at *11 n.3 ("Because I would find that the issue of PBS's

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[5] *See* 2017 Decision and Order, at *5-*8.

[6] *See* 2017 Decision and Order, at *8-*10. PBS has included references to specific page numbers in footnotes 3-6 to comply with 29 C.F.R. § 102.48(c)(1). Relevant citations are also included throughout the Motion, where applicable.

status as an individual successor to Clean-Right has not been fully litigated, I need not and do not reach whether the 'individual successor' theory is closely connected to the unfair labor practice complaint.") (Miscimarra, dissenting); *N.L.R.B. v. Coca Cola Bottling Co. of Buffalo,* 811 F.2d 82, 87 (2d Cir. 1987) (An "uncharged violation may only be found [] if all issues surrounding the violation have been litigated fully and fairly.").

The Board, however, disregarded the Second Circuit's directive and ***reversed*** the due process analysis. Instead of adhering to the Second Circuit's instructions, the Board first addressed whether the individual successorship issue was "closely related" to joint successorship issue, and after finding that it was "in all practical terms identical," it was *fait accompli* that the issue had been fully litigated. *See* 2017 Decision and Order, at *3 ("The issue of single successorship is not only 'closely related' to the complaint allegation of joint successorship; it is in all practical terms identical."). This analysis is legally unsupportable and undermines PBS's due process rights.

The Board must actually examine the existing factual record because "whether a charge has been fully and fairly litigated is so peculiarly fact-bound as to make every case unique; ***a determination of whether there has been full and fair litigation must therefore be made on the record in each case***." *Pergament United Sales, Inc. v. N.L.R.B.*, 920 F.2d 130, 136 (2d Cir. 1990) (emphasis added). The Board's majority essentially ***admits*** that the record lacks any evidence concerning the individual successor issue, stating that because the Board found the individual and joint successor issues to be identical, "PBS's failure to introduce such evidence" before the ALJ does not deprive PBS of due process, "since the purported evidence is either irrelevant or would not require a different result even if adduced and credited." 2017 Decision and Order, at *4. Of course, the Board's "no harm, no foul" approach turns due process on its

head, finding that PBS, in essence, waived its right to present evidence on an issue that the Second Circuit acknowledged "was not alleged in the Union's complaint or advanced by the General Counsel." *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 448.

Dissenting Chairman Miscimarra correctly identified the flaw in the Board majority's analytical framework: since the "General Counsel's theory of the case was that PBS and AM were ***joint employers*** and therefore joint successors with a joint obligation to recognize and bargain with the Union, PBS could have reasonably chosen a litigation strategy aimed at defeating the General Counsel's case on the threshold joint-employer issue." 2017 Decision and Order, at *11 (Miscimarra, dissenting) (emphasis added). That is precisely what PBS did, with PBS's defense focusing on whether it was a joint employer with ***AM*** (the party with which PBS contracted), not whether it was an individual successor to ***Clean-Right*** (a wholly different entity than AM). "When the record was created at the unfair labor practice hearing, PBS was not on notice that the evidence being adduced might be used to support a claim that it was *individually* Clean-Right's successor and *individually* violated Section 8(a)(5) of the Act by failing to recognize and bargain with the Union." *Id.* (Miscimarra, dissenting) (emphasis in original).

PBS would have modified its litigation strategy if the General Counsel had pursued a theory of individual successorship; "whether a matter has been fully litigated rests in part on . . . whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Pergament United Sales*, 296 NLRB 333, 335 (1989). Indeed, PBS's litigation strategy was borne of the fact that this case concerned a flurry of joint employer/discrimination claims involving a new building owner (AM) that terminated a developer's highly-paid cleaning staff (Clean-Right, which served as an accessory to a developer, rather than as a for-profit cleaning business), hired and then fired PBS after its

employees went on strike, and then hired another company (Servco) to handle the building's cleaning services—all of which occurred in a span of 13 months.

"It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is." *Champion Int'l Corp.*, 339 NLRB 672, 673 (2003). Both the Board and the Second Circuit agree that "not once, but twice [] the General Counsel did not litigate this case on the theory that PBS individually was Clean-Right's successor." 2017 Decision and Order, at *11 (noting that the "General Counsel neither litigated a theory of individual successorship at the unfair labor practice hearing nor joined the Union's attempt to urge that theory on reconsideration") (Miscimarra, dissenting); *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 448. Consequently, it was a material error to hold that PBS was fairly afforded an opportunity to focus its defense on the single-employer successorship issue, when it never was aware the issue was potentially relevant to its defense. *See Indep. Elec. Contractors of Houston, Inc.*, 720 F.3d at 554 (declining to enforce Board's order on due process grounds because, *inter alia*, "[e]ven if this internally inconsistent theory had been timely asserted, the Respondent could not have known what kind of defense to pursue").

II. Due Process Precludes the Board from Reaching the Unalleged "Individual Successor" Issue Because it is Unconnected to the Actually Litigated "Joint Employer" Issue.

Even if the "individual successor" issue was, in fact, fully and fairly litigated (which it was not), due process permits the Board to find an unalleged violation of the Act only if the issue "is closely connected to the subject matter of the complaint." *Pergament*, 296 NLRB at 334. "Under the 'closely connected' standard, the employer must be informed of the acts forming the basis of the complaint, but not necessarily the legal theory upon which the General Counsel intends to proceed." *Indep. Elec. Contractors of Houston, Inc.*, 720 F.3d at 558 (*citing Pergament*, 920 F.2d at 135).

In the present case, the Board's majority held that a "close connection" existed on successorship because "the test for single successorship is entirely subsumed within the test for joint successorship." 2017 Decision and Order, at *6. This conclusion, however, disregards the allegations "which formed the basis of the complaint" and the issues affirmatively litigated by the General Counsel. As stated by the Board majority, "the General Counsel's complaint alleged that AM and PBS [were] ***joint employers***" and thus joint successors. *See* 2017 Decision and Order, at *2 (emphasis added). Both as a legal and factual matter, whether PBS and AM were ***joint employers***—the threshold issue that must be resolved before reaching any successorship issues—is entirely independent of whether PBS was an ***individual successor*** to Clean-Right.

As recognized by the Second Circuit, the legal and factual analysis related to the "joint employer" issue focused on the supervisory and hiring tasks purportedly performed by AM employee Dennis Henry, and, in particular, the "limited and routine" supervisory tasks Henry performed for PBS. *See Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 442-43 (noting that "an essential element of any joint employer determination is sufficient evidence of immediate control over the employees, namely, whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process") (quotations and citations omitted). The "joint employer" issue—which examined the legal and factual relationship between ***PBS and AM***—is completely unrelated to the "individual successor" issue, which requires examination of the relationship between ***PBS and Clean-Right***, and, in particular, "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new

entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 43 (1987).

Chairman Miscimarra rightly noted this lack of connectivity between the "joint employer" and "individual successor" issues, stating in his dissent that "a litigation strategy aimed at defeating the General Counsel's case on the threshold joint-employer issue . . . would have been focused on demonstrating that PBS and AM did not share or codetermine those matters governing the essential terms and conditions of employment of PBS's employees . . . ." 2017 Decision and Order, at *11 (Miscimarra, dissenting). That is, in fact, what PBS succeeded in doing. In essence, PBS is now being punished for successfully defending the joint employer issue that was actually alleged and litigated by the General Counsel.

Even if certain evidence adduced to defeat the General Counsel's "joint employer" theory overlaps with evidence bearing on the separate "individual successor" issue, "the presence of evidence in the record to support a charge unstated in a complaint . . . does not mean the party against whom the charge is made had notice that the issue was being litigated." *Enloe Med. Ctr.*, 346 NLRB 854, 855 (2006). "[T]he issue is not whether such evidence exists, but whether the Respondent was given a fair opportunity to present such evidence." *Id.* at 856 n.7; *Conair Corp. v. N.L.R.B.*, 721 F.2d 1355, 1371 (D.C. Cir. 1983) ("[T]he critical issue is not whether there is substantial evidence in the record indicating that the mailgram occasioned actual termination of the strikers' employment. That issue [] should not have been reached by the Board, for Conair was never told before the hearing record closed that the stakes included liability for discharges effected on April 22, 1977.").

Because the Board's majority improperly conflated the joint employer and successorship issues to reach the Union's preferred conclusion, the Board's decision only further amplifies the due process defects, which can only be cured by remand.

III. Because PBS Has Not Been Afforded Due Process, Remand to the ALJ is Necessary to Fully and Fairly Litigate the Individual Successorship Issue.

Because due process is lacking for PBS, the necessary follow up question—as correctly noted by the Second Circuit—is "whether remand is appropriate under *Enloe*." *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 449 ("[I]f the Board finds that due process concerns do preclude it from reaching this issue, it should determine whether remand is appropriate under *Enloe*."); 2017 Decision and Order, at *11 ("The Court directed the Board to determine whether this unalleged 'individual successor' issue may be decided on the existing record consistent with due process, and if not, whether a remand to the administrative law judge is warranted to provide PBS an opportunity to litigate this issue.") (Miscimarra, dissenting).

Given the Board's extraordinary delay in processing this matter, PBS would be warranted in requesting dismissal of the complaint.[7] *See, e.g., TNS, Inc. v. N.L.R.B.*, 296 F.3d 384, 403 (6th Cir. 2002) (noting that courts can "refuse to enforce agency awards when undue delay has made their enforcement inequitable" and vacating a Board decision when the initial case was filed in 1982 but "the Board did not issue its second decision until September 1999, more than four years" after accepting remand from the D.C. Circuit). Nonetheless, PBS's requested remedy is more circumscribed. Ever since the Board accepted remand from the Second Circuit, PBS has consistently requested—and hereby renews its request in this Motion—further remand to the ALJ to develop an adequate record upon which the Board may determine whether PBS was an

[7] Although this Motion is not the appropriate vehicle to detail why PBS has no liability for the alleged violations of the Act, suffice it to say that, following remand, PBS will present ample evidence indicating that PBS did not violate the Act.

individual successor to Clean-Right. *See Enloe*, 346 NLRB at 856 ("We have . . . taken the lesser step of remanding for further hearing on the issue . . . .").

PBS's remand request is consistent with *Enloe*, which held that, "in order to remedy any prejudice suffered by the Respondent, we shall remand this complaint allegation to the judge to provide the Respondent an opportunity to litigate" an alleged violation of the Act that "was not alleged or actually litigated." *Enloe*, 346 NLRB at 855-56; *Roundy's Inc. v. N.L.R.B.*, 674 F.3d 638, 646 (7th Cir. 2012) (rejecting argument "that the Board erred in remanding the case for further evidence on the General Counsel's property right theory because this theory was not raised in the complaint or during the hearing before the ALJ" and "find[ing] that the Board acted within its discretion in remanding the case for further development of the property right theory").

Remand will permit the parties to litigate a number of issues intimately related to the unalleged "individual successorship" theory, including, but not limited to, the following:

- ***Whether the bargaining unit at 80-90 Maiden Lane remained appropriate***. As noted by the Second Circuit, "central to a finding of legal successorship is whether the bargaining unit that the union seeks to represent remains appropriate under the successor's operations." *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 448. The Board's majority concluded that, since a single-unit presumption applies relative to appropriate bargaining units, that was, in effect, good enough to find PBS liable. However, "the issue of whether the surviving unit of PBS employees at 80-90 Maiden Lane remained appropriate has not been fully litigated. The Court instructed the Board to apply its presumption that a single-location unit is appropriate. ***But this presumption is rebuttable, and PBS is entitled to an opportunity to rebut it***." 2017 Decision and Order, at *11 (Miscimarra, dissenting) (emphasis added).

Tellingly, the record evidence that does exist casts doubt on whether the bargaining unit remained appropriate in this case; in particular the fact that "AM displaced some union-represented Clean-Right employees when it directly hired its own elevator operator and day porters to work at 80-90 Maiden Lane . . . . PBS is entitled to an opportunity to litigate whether the PBS unit remained appropriate in light of the removal of the elevator operator and day porter *positions* from the previous Clean-Right unit." *Id.* (emphasis in original).

- ***Whether a multi-location unit, rather than a single-location unit, is appropriate.***

Related to the issue of bargaining unit composition is the propriety of a multi-site bargaining unit. The Board's majority performed a perfunctory analysis on the multi-site issue that "focus[ed] . . . on the surviving employing unit alone, and the extent to which, from the employees' perspective, the unit differs from its predecessor unit." 2017 Decision and Order, at *4. Notably, the Board failed to apply the multiple factors of the single-location test, focusing almost exclusively on the experience of individual employees. *Id.*

However, even taking the Board's "employee-viewpoint" analysis at face value, its conclusion is directly contradicted by the existing record evidence detailing the experiences of the former Clean-Right employees. As the Second Circuit noted, PBS sent former Clean-Right employee Zolia Gonzalez a written offer of employment, but when she "reported to work, she was met by Henry, who presented her with a work cart and a mop. ***Gonzalez protested that she had not previously been required to perform this type of heavy work*** . . . ." *Serv. Employees Int'l Union, Local 32BJ*, 647 F.3d at 440 (emphasis added).

Thus, the Board majority's treatment of all building cleaning operations as similar is belied by the record evidence confirming that PBS modified certain job duties and ***did not*** continue Clean-Right's operations uninterrupted. The Board's overly simplistic analysis on the

single-site issue confirms that PBS "has raised legitimate questions regarding this issue that cannot be adequately answered on the existing record" and that, if remand occurred, PBS may "ultimately succeed in rebutting the presumption that a unit limited to its employees at 80-90 Maiden Lane was appropriate . . . ." 2017 Decision and Order, at *11 (Miscimarra, dissenting).

- ***Whether substantial continuity of operations existed between PBS and Clean-Right***. Another issue inexorably intertwined with the composition of the bargaining unit is whether there existed substantial continuity of operations between PBS and Clean-Right. If there was, in fact, no substantial continuity of operations between the two entities, then PBS had no obligation to recognize or bargain with the Union. Because "it would be difficult to untangle the issue of substantial continuity of operations from issues relating to unit appropriateness . . . I would permit PBS to litigate this issue on remand as well." 2017 Decision and Order, at *11 n.9 (Miscimarra, dissenting).

- ***Whether, if PBS was an individual successor to Clean-Right, PBS had the right to set initial terms of employment that differed from Clean-Right's terms of employment***. Even if PBS is found to be Clean-Right's successor, it remains an open issue as to whether, under *Love's Barbeque*, 245 NLRB 78 (1979), "PBS forfeited its right . . . to set initial terms and conditions of employment that differed from Clean-Right's." 2017 Decision and Order, at *11 n.3 (Miscimarra, dissenting). Prior Board Members—including Miscimarra and Peter Hurtgen—have urged overruling the portion of *Love's Barbeque* holding that an employer forfeits its right, under *N.L.R.B. v. Burns Security Services,* 406 U.S. 272 (1972), to set initial terms and conditions of employment after refusing to hire a predecessor's employees, on the basis that "this aspect of *Love's Barbeque* deviates from the Supreme Court's holding in *Burns* that a successor is not bound by its predecessor's contractual obligations but rather is free to set its own initial

employment terms." 2017 Decision and Order, at *11 n.3 (Miscimarra, dissenting). At minimum, even if the ALJ follows *Love's Barbeque*, remand is necessary to "permit [PBS] to present evidence that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals." *Id.*

- ***Whether, if PBS was an individual successor to Clean-Right, PBS was obligated to bargain with the Union***. Finally, even if PBS is determined to be Clean-Right's successor, the issue remains whether PBS was obligated to bargain with the Union. "In the successorship situation, the successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a substantial and representative complement of employees, a majority of whom were employed by the predecessor. . . . [T]he employer's obligation to recognize the union commences at that time, as soon as those two events have occurred . . . ." *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 344 n.8 (1999). While the Board majority concluded that no bargaining demand was necessary because PBS refused to hire the former Clean-Right employees, this approach improperly rewrites the successorship test. Since "the union's demand establishes the moment in time when the Board evaluates when the other prerequisites to successor status have been satisfied. . . . [T]he Board must also permit PBS to present evidence on this issue on remand." 2017 Decision and Order, at *11 n.9 (Miscimarra, dissenting).

IV. The Board's Inexcusable Delay in Issuing its 2017 Decision and Order Has Materially Prejudiced PBS, Which Can Be Remedied Only by Remand.

While PBS recognizes the wheels of justice can sometimes turn slowly, the Administrative Procedures Act ("APA") nonetheless requires that the Board act "[w]ith due regard for the convenience and necessity of the parties or their representatives" such that "within a reasonable time, [it] shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b); *Emhart Indus., Hartford Div. v. N.L.R.B.*, 907 F.2d 372, 379 (2d Cir. 1990) ("[T]he NLRB, like other federal agencies, has a statutory duty to conclude its proceedings within a reasonable time.") (quotations and citations omitted). When the Board fails to act "within a reasonable time" and the Board's inexcusable delay prejudices a litigant, reviewing courts often decline to enforce such "inequitable" decisions. *See TNS, Inc.*, 296 F.3d at 403.

PBS is presently in a Catch-22, needing to move the Board for reconsideration of an inexcusably delayed decision—and potentially further delaying resolution of this seemingly endless litigation—so that it may properly preserve issues for appellate review, should the Board decline to correct its 2017 Decision and Order.[8] However, the alternative option is even less appealing: if the Board denies PBS's Motion, and PBS succeeds in securing remand to the ALJ only ***after*** additional briefing and argument before a federal appellate court, the parties will be in the exact same place as if the Board grants PBS's requested relief now—litigating the "individual successor" issue before the ALJ after another prolonged delay. In other words, if the Board corrects its material errors ***now*** and timely remands to the ALJ for further proceedings ***before*** any proceedings commence in a federal appellate court—when PBS stands ready, willing,

[8] That is why "[t]he activities and jurisdiction of the National Labor Relations Board require efficient resolution of adjudicative disputes. . . . [R]emedial action must be speedy in order to be effective." *N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965).

and able to litigate the successorship issue that due process demands PBS be allowed to litigate—remand will accelerate, rather than delay, the conclusion of this matter.

Moreover, remand to the ALJ will cure two instances of material prejudice that PBS has suffered as a result of the nearly 18-year delay between the Union's initial filing of unfair labor practice charges[9] and the Board's issuance of its 2017 Decision and Order.[10] *First*, the Board's unnecessary delay resulted in the issuance of a remedy—ordering that PBS "compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 2 allocating the backpay awards to the appropriate calendar year for each employee"[11]—which would be wholly unnecessary but for the delay. In effect, because the Board did not act "within a reasonable time," as required by the APA, the Board has ordered that PBS "fix" a problem it had no hand in creating.[12] Remand under *Enloe* can correct this prejudice, since remand will permit PBS to reopen the record and present exculpatory evidence indicating that it was not an "individual successor" to Clean-Right, which will obviate the need to issue any award for backpay.

Second, remand to the ALJ will ensure that no further witnesses disappear, that the remaining witnesses are examined while this matter is as fresh as is reasonably possible, and that no additional inadvertent loss of evidence occurs based on the passage time. PBS will undoubtedly face practical challenges in mounting a vigorous defense on the "individual

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9 *See Service Employees Int'l Union, Local 32BJ*, 647 F.3d at 441 (noting that "[i]n 2000 and 2001, Local 32BJ filed a series of unfair labor practice charges against PBS, AM, and Servco").

10 The Board's 2017 Decision and Order is dated December 15, 2017. The Board took more than five-and-a-half years to issue its decision after it "accepted the Court's remand" of this case "[o]n May 30, 2012." *Id.* at *3.

11 *See* 2017 Decision and Order, at *10.

12 *See Service Employees Int'l Union, Local 32BJ*, 647 F.3d at 438-39, 442 (noting that it was the "Union" which sought "review of three decisions of the National Labor Relations Board" and had initially "moved for reconsideration" with the Board before appealing to the Second Circuit).

successor" issue nearly two decades ***after*** the relevant events occurred, as "the testimony of several pertinent witnesses would be difficult, if not impossible, [] to procure"; "the witnesses' memories have faded over the several years and they would be unable to recollect specific details"; and "the inadvertent loss, or even intentional destruction in the course of business, of relevant [] documents . . . would seriously impair [the employer's] ability to present a defense." *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733 (7th Cir. 2003) (discussing material prejudice related to inexcusable delay in the litigation context[13]). Thus, the only way to ensure that PBS is not ***irrevocably*** prejudiced in these proceedings is to timely remand to the ALJ before any more relevant evidence is lost to the passage of time.

[13] These are precisely the challenges PBS will face on remand, and that is why "administrative delay before the Board is deplorable." *Emhart*, 907 F.2d at 378.

CONCLUSION

Because the Board materially erred in at least four respects when it issued its 2017 Decision and Order, the Board should reconsider and modify its decision and remand to the ALJ for further proceedings consistent with the foregoing Motion.

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Dated: January 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2018, I served a true and correct copy of *Respondent Planned Building Services, Inc.'s Motion for Reconsideration* upon the following persons by electronic mail, with additional copies sent by overnight delivery via Federal Express.

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